

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In Re: Methyl Tertiary Butyl Ether (MTBE)
Products Liability Litigation

**Master File No. 1:00 - 1898
MDL 1358 (SAS)
M21-88**

Civil Action

This Document Relates To:

*New Jersey Dept. of Env'tl. Prot., et al. v.
Atlantic Richfield Co., et al., No. 08 Civ. 312*

**PLAINTIFFS' REPLY TO DEFENDANT GETTY PROPERTIES CORP.'S
OPPOSITION TO THIRD-PARTY DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Plaintiffs the New Jersey Department of Environmental Protection, the Commissioner of the New Jersey Department of Environmental Protection, and the Administrator of the New Jersey Spill Compensation Fund (collectively “Plaintiffs” or “NJDEP”) file this Reply to Defendant’s (and Third Party Plaintiff) **Getty Properties Corp.’s (“Getty”)** Opposition to the Third Party Defendants’ (Dhandi Transport, Robert Melecci and HP Delta) motion for summary judgement to address fact assertions in Getty’s opposition with respect to the presence of methyl tertiary butyl ether (MTBE) in gasoline supplied by Getty to the HP Delta site.

Although this Reply addresses erroneous fact assertions by Getty, Plaintiffs note that Getty agrees with Plaintiffs that there are disputed issues of fact that preclude summary judgment. As Getty’s Opposition states: “The disputed facts include, but are not limited to, whether the Lancaster Rd. MTBE contamination at issue was caused by Third Party defendants or by a release from tanks owned by Getty Properties Corp. in 1987.” Getty Opposition at 1.

SUMMARY OF REPLY

NJDEP filed an Opposition to Dhandi’s Motion for Summary Judgment against Getty because Dhandi’s moving papers contained erroneous assertions that could impact NJDEP’s claims. For the same reasons, NJDEP now files this Reply to Getty’s Opposition because Getty’s Opposition also contains erroneous factual assertions that could impact NJDEP’s claims against Getty.

Getty’s Opposition to the Third Party Summary Judgment Motion asserts: (1) Getty’s tank field was in a different location than the Melecci tank field; (2) Getty did not sell MTBE gasoline to the HP Delta Site or to Melecci; and (3) there is no evidence of MTBE soil or groundwater contamination in 1987, when Getty’s underground storage tanks (USTs) were

removed.

Plaintiffs dispute each of these assertions. First, the two tank fields at the HP Delta Site are not in different locations, but instead are in virtually the same location. The MTBE detected in this location is attributable both to leaks that occurred while Getty was at the site and to additional leaks and spills that occurred after Getty left the site. Second, there is extensive evidence that MTBE would have been in gasoline Getty supplied to its own leaking USTs at the site. Third, although no tests were conducted for MTBE at the time Getty's tanks were removed, the first time that tests were conducted at that location following removal of the Getty tanks, MTBE was detected at high levels in both soil and groundwater.

ARGUMENT

A. **MTBE Has Been Detected In Soil And Groundwater At The Location Of The Getty Tanks.**

When Getty's USTs were removed from the HP Delta site in 1987 six holes were observed in one of the tanks and soil contamination was observed. No tests were conducted at this time, however, for the presence of MTBE. The NJDEP's 1987 Administrative Order found:

"3) One tank which had been in use as late as the week of June 22, 1987, was observed to have at least six (6) holes and a strong odor of gasoline was noted in the excavated soil. Thereby confirming a discharge of a pollutant into the waters and/or onto the land of the State."

"5) Excavation of contaminated soil due to the leak in the tank began on July 2, 1987. However, on July 21, 1987, excavation was terminated for safety reasons."

“6) The above mentioned excavated soil was placed on top of plastic and then completely covered with plastic to preclude any further discharges of said pollutants into the waters or onto the lands of the State The plastic covering is used as a temporary measure to store contaminated soil awaiting proper waste classification and proper and permanent disposal. Routine maintenance is necessary to insure that the cover remains in place.

“7) In August 1987 it was observed that the plastic covering over the pile of contaminated soil had come off, therefore, leaving the contaminated soil uncovered. The potential then existed for water runoff to the waters and lands of the State and possible release of vapors to the environment. Based upon routine inspections it was determined that the contaminated soil was again properly covered on November 27, 19987 by the station owner, due to numerous public complaints.”

“9) As of the date of this Order [12-15-87], Getty has not made any effort to remove and properly dispose of any contaminated soil or to forward all soil sampling results to the Department, verifying complete cleanup of the discharge.”

Axline Declaration previously submitted in support of Plaintiffs’ Opposition to Dhandi Transport Motion for Summary Judgment (**hereafter “Axline Decl.”**), Ex. 12 (12/15/1987 Administrative Order.)

In 2005, homeowners located near the HP Delta site complained to the State of odors in their water supplies. Testing revealed the presence of MTBE as high as 19,000 parts per billion (ppb) in those wells. NJDEP Rule 56.1 Statement of Facts, ¶ 59. The maximum contamination level for MTBE in groundwater in New Jersey is 70 ppb.

Tests for MTBE were then conducted for the first time at the HP Delta site. MTBE was detected in groundwater beneath the site at levels as high as 242,000 ppb. The following year, a

monitoring well on site had a detection level of 253,000 ppb. Axline Decl. Ex. 4 (Aquilologic Report at 15). The levels of MTBE contamination at both the residential wells and at the HP Delta location are dramatic and indicate a long term, persistent MTBE problem.

Following removal of the Getty USTs, Mr. Melecci installed new USTs, which are still in use at the site. Although Getty suggests that the Melecci tanks were placed in a different location than Getty tanks, and therefore MTBE detections near the Melecci tanks are irrelevant to the Getty tanks, in fact the Melecci tanks are in virtually the same location as the Getty tanks and MTBE detections in the area are relevant to both.

The Site itself is approximately one-half acre and contains gasoline pumps and a building covered by a canopy as well as a one-story building and auto repair service station and an area for vehicle storage. (Molly McGinley Han Declaration submitted in support of Plaintiffs' Reply to Getty Petroleum Corp.'s Opposition to Third Party Defendants' Motion for Summary Judgment (**hereafter "Han Decl."**), Ex. 1 at Fig. 2a (Aquilologic Report); Han Decl. Ex. 2 at NJDEP-SITE233-005298 & Fig. 2 (HCR Annual Site Update Report). The new tanks installed by Melecci are a few feet away from the location of the Getty tanks, and MTBE detected in the area cannot be isolated to the Melecci tanks based on distance from the Getty tanks.

MTBE from Getty UST releases would not, in any event, be restricted to the area where the tanks were located. In addition to the fact that contamination spreads throughout release sites through vapor expansion, Getty allowed the contaminated soil that was excavated at the site when the Getty tanks were removed to stay on site for nearly a year, and that soil was not covered, or adequately covered, during much of that time. Axline Decl. Ex. 12 (12/15/1987 Administrative Order).

The wells that have been tested at the site demonstrate that the site is riddled with MTBE contamination. The releases have spread throughout the vicinity and are indistinguishable. The maps of the experts of all parties are unable to make a marked distinction between the locations of the two areas where the tanks were installed and maps of the HP Delta Site show that the tank fields are either overlapping or adjacent to each other. Axline Decl. Ex. 13 at NJDEP-SITE233-005316 (HCR Annual Site Update Report); and Han Decl. Ex. 3 at Fig. 5 (Kleinfelder Report, showing the tanks fields being less than 10 feet from each other); Han Decl. Ex. 4 at NJMTBE-HPDELTA-001675 (“Traissic Technology Report”).

The samples collected on-site reveal that MTBE’s highest concentration in the groundwater of the unconsolidated sediments falls in monitoring well number 8 (MW-8), close to the location of the former Getty tanks. Axline Decl. Ex. 13 at NJDEP-SITE233-005316 (HCR Report); Han Decl. Ex. 1 at 34 & Figure 2a (Aquilologic Report); and Han Decl. Ex. 5 at Bates No. NJDEP-SITE233-006877 (The Louis Berger Group, Inc. Draft Report). Plaintiffs expert, Anthony Brown prepared a report identifying MTBE contamination in MW-8 as high as 276,000 ug/L MTBE in May, 2007. Han Decl. Ex. 1 at 17, 34 (Aquilologic Report); *see also* Han Decl. Ex. 2 at 5 (HCR Report).

Moreover, the third party defendant’s report from Triassic Technology focused on the age of the gasoline at the site and opined that at least some of the contamination at the site originated in the 1980s, from the Getty tanks. Han Decl. Ex. 4 at 27 (Triassic Technology Report).

B. Getty Supplied Gasoline To The USTs It Owned At The HP Delta Site For Twelve Years

Getty owned the underground storage tanks at the HP Delta site and supplied gasoline to those tanks from 1975 to 1987. Han Decl. Ex. 6 (3/02/10 Letter from J. Dicker to M. Lewis.) The station was branded as a “Getty” station during this entire time. *Id.*; Axline Decl. Ex. 1 at 19-21 (9/02/12 Depo. of R. Melecci). In 1983, the station was sold to the current owner, Robert Melecci. Han Decl. Ex. 6 (3/02/10 Letter from J. Dicker to M. Lewis); Axline Decl. Ex. 1 at 18 (Melecci Depo.). When Melecci purchased the station, he acquired the Contract Dealer agreement already in place with Getty Oil. Axline Decl. Ex. 1 at 18-20 (Melecci Depo.).

Between 1975 and 1987 Getty went through several name changes. In 1975 Getty’s corporate name was “Getty Oil.” Texaco purchased Getty Oil in 1984, and in February, 1985, sold the “Getty” assets to “Power Test Corporation.” Power Test Corporation then changed its name to “Getty Petroleum” and eventually to “Getty Properties.”¹ Axline Decl. Ex. 10 at 1 & 5 (Defendant Getty Properties Corp.’s Answers and Objections to Plaintiffs’ First Set of Requests for Admissions”). When Texaco sold “Getty” assets to Power Test Corporation (n/k/a Getty Properties), it included the contract dealer agreement with Melecci. *Id.* at 5.

Although Getty insinuates that its connection to the HP Delta Site was limited to the years 1985 to 1987, that is contradicted by Getty’s own admissions. Han Decl. Ex. 6 (3/02/2010 Letter from J. Dicker to M. Lewis). Getty focuses on the fact that it had a contract dealer agreement to supply gasoline to Melecci from February 1, 1985 until June, 1987. Getty ignores, but does not deny, the fact that it also owned and supplied the USTs at the site, and branded the station as a “Getty” station, for the 12 years between 1975 and the summer of 1987. *Id.*; *see also* Axline

¹ In 1997, Getty Properties spun-off its petroleum marketing business to Getty Petroleum Marketing Inc. or “GPMI”. Han Decl. Ex. 7 at 3 (8/06/08 Opinion and Order of J. Scheindlin in *In re MTBE: County of Suffolk v. Amerada Hess Corp.*)

Decl. Ex. 1 (Melecci Depo.)

C. Getty Gasoline Contained MTBE And Contributed To MTBE Contamination At The HP Delta Site

When Texaco bought Getty in 1984 and sold it to Power Test/Getty in 1985, the parties agreed that Texaco would supply Power Test/Getty with gasoline. Han Decl. Ex. 8 at 70-71 (Getty Realty 10-K Ex. 10.3) Spreadsheets produced by Texaco in discovery document Texaco's extensive gasoline sales to Power Test/Getty between 1985 and 1988. Han Decl. Ex. 9 (CHEVMDL1358_NJDEP-UTX 00000000086-124). And as noted above, when Texaco sold "Getty" assets to Power Test Corporation (n/k/a Getty Properties), it included the contract dealer agreement with Melecci.

MTBE was used as an octane enhancer in New Jersey throughout the 1980s. Axline Decl. Ex. 4 at 3 (Aquilologic Report). Third party defendant HP Delta's expert concurs: "MTBE is an additive used in gasoline since about 1980 and was present in leaded gasoline in the mid-1980s." Axline Decl., Ex. 11 at 6 (Triassic Technology Report). ARCO commented in guidance materials prepared in 1990 that "Refiners along with tankers, barges, and pipelines have handled neat MTBE for the past nine years." Han Decl. Ex. 10 at Bates# LAN0187318 (MTBE Octane Enhancer Technical Guidance and Recommended Practices for Storage and Handling (5/22/90); *see also id.* at bates# LAN0187313). During the time that Texaco was supplying gasoline to Power Test/Getty, Texaco used MTBE as an octane enhancer in its gasoline. As a 1989 ARCO White Paper noted: "Eastern U.S. producers [of MTBE] in addition to ARCO Chemical include Amoco, Champlin, Chevron, Exxon, Phillips, Shell and Texaco." Han Decl. Ex. 12 at Bates

#LAN0326912 (ARCO “White Paper”).

Getty admits it purchased gasoline containing MTBE for sale and distribution during the relevant time period. In the *County of Suffolk* case in this MDL, Getty admitted that pre-1997, GPC purchased gasoline containing MTBE for retail sale and distribution. Han Decl. Ex. 11 (Defendant Getty Properties Corp.’s Amended Disclosure Pursuant to June 9, 2005 Directive.)

Getty does not deny that the gasoline it supplied to Melecci’s gas station between 1985 and 1987 contained MTBE. When Plaintiffs asked Getty to admit that Getty “through one or more distributors, supplied gasoline product containing MTBE to Rob’s Service Station (now known as HP Delta), located at 439 Lake Avenue, Woodbridge, New Jersey, from between 1983 to 1987,” Getty responded: “As to that time period, Getty Properties can neither admit nor deny this Request as after reasonable inquiry the information known or readily available is insufficient to enable Getty Properties to admit or deny this request.” Axline Decl., Ex. 10 at 5 (Defendant Getty Properties Corp.’s Answers and Objections to Plaintiffs’ First Set of Requests for Admissions, Response to Admission No. 3).

Getty’s Opposition asserts that there is no record evidence that Getty ever sold gasoline containing MTBE to Robert Melecci.² Getty Opposition at 6. Getty, however, has produced no records indicating that the gasoline it sold to this site during the relevant time period did not contain MTBE. Getty also has produced no evidence to rebut Plaintiffs’ evidence that MTBE was in gasoline throughout New Jersey during this time period.

Although Getty has previously argued that it was one of the first companies to advocate

² Getty’s 56.1 Statement carefully states in its Statement of Additional Facts that, “GPC never sold gasoline containing MTBE to the owner of HP Delta.” Getty 56.1 Statement at Additional Fact No. 5. HP Delta has been the operator at the site only since 2003.

the use of ethanol, Getty has admitted that it did not begin using ethanol until 1990, several years after the releases at the HP Delta site occurred. Han Decl. Ex. 13 at 2 (9/07/07 Letter from to D. Mulvihill to R. Greenwald). The obvious inference from Getty's "switch" to ethanol in the 1990's is that Getty, like all other gasoline suppliers in the 1980's, used MTBE as an octane enhancer.

Dated this 27th day of January, 2014.

Respectfully submitted,

/s/
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PROOF OF SERVICE VIA LEXISNEXIS FILE & SERVE

New Jersey Department of Environmental Protection, et al. v. Atlantic Richfield Co., et al.
United States District Court, Southern District of New York, Case No. 08 Civ. 00312 (SAS)

I, the undersigned, declare that I am, and was at the time of service of the paper(s) herein referred to, over the age of 18 years and not a party to this action. My business address is 1050 Fulton Avenue, Suite 100, Sacramento, CA 95825-4225.

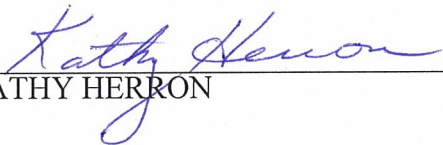
On the date below, I served the following document on all counsel in this action electronically through LexisNexis File & Serve:

**PLAINTIFFS' REPLY TO DEFENDANT GETTY PROPERTIES CORP.'S
OPPOSITION TO THIRD-PARTY DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT; AND**

**DECLARATION OF MOLLY MCGINLEY HAN IN SUPPORT OF PLAINTIFFS'
REPLY TO DEFENDANT GETTY PROPERTIES CORP.'S OPPOSITION TO THIRD-
PARTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on January 27, 2014, at Sacramento, California.


KATHY HERRON